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Supreme Court of the United States.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Petitioner,*

vs.

EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED, *Respondent.*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF, TOGETHER WITH NOTICE OF APPLICATION AND ACKNOWLEDGMENT OF SERVICE THEREOF.

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EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED, *Respondent*.

NOTICE OF APPLICATION FOR WRIT OF CERTIORARI.

To Messrs. T. D. Sheehan and H. J. Goodwin, her attorneys of record:

You and each of you are hereby notified that on Monday, the 2nd day of March, 1925, at the convening of court, or as soon thereafter as counsel can be heard, the undersigned will present and submit to the Supreme Court of the United States a petition for writ of ceritorari and brief in support thereof, praying the Honorable, the Supreme Court of the United States, to cause to be issued a writ of certiorari directed to the Supreme Court of the State of Minnesota and the District Court of Dakota county of said state, commanding said courts to certify to the United States Supreme Court, for review, a transcript of the record and proceedings of said District Court and said Supreme Court in

the cause entitled: "Edith F. Coogan, as Special Administratrix of the Estate of William Coogan, Deceased, Respondent, against Chicago, Milwaukee & St. Paul Railway Company, Appellant," being No. 24105 of the state Supreme Court of the state of Minnesota.

A true copy of petition for writ of certiorari and brief in support thereof are hereto attached and made a part hereof.

F. W. Root,
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On Brief for Petitioner.

Service of the foregoing notice of submission and a copy of the petition for certiorari and brief in support thereof are hereby acknowledged this 3rd day of February, 1925.

W. Sheehan & H. J. Gardner
Attorneys for Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Petitioner,*

vs.

EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED, *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Now comes the Chicago, Milwaukee & St. Paul Railway Company and respectfully petitions this Honorable court to grant a writ of certiorari to the Supreme Court of the state of Minnesota and to remove therefrom to this court, for review, the record in the case, there lately pending, entitled: "Edith F. Coogan, as Special Administratrix of the Estate of William Coogan, Deceased, Respondent, against Chicago, Milwaukee & St. Paul Railway Company, Appellant," being cause No. 24105 on the docket of that court, the petitioner herein being the said appellant-defendant.

A duly certified copy and nine uncertified copies of the entire record, including all proceedings in the District Court of Dakota county, Minnesota, where the said cause was tried, and in the Supreme Court of the state of Minnesota, to which an ap-

peal was taken from the judgment of said District Court, are filed herewith under separate cover.

Petitioner representing that it is aggrieved by a final judgment of the Supreme Court of the state of Minnesota entered in said court on the 13th day of November, 1924, in the aforesaid case; that the matters at issue in said cause are wholly of a federal nature and are of peculiar gravity and importance in that said suit is to recover damages under the Federal Employer's Liability Act of Congress of April 22nd, 1908 (35 Statutes at Large 65) and Acts amendatory thereof, for the death of William Coogan, alleged to have occurred while said William Coogan was in the employ of the petitioner as a brakeman on an interstate freight train.

Petitioner presents this application for writ of certiorari with a conviction of the justice of its position and respectfully prays that its petition be granted to the end that the particular points raised herein may be fully and finally considered and determined.

STATEMENT OF FACTS.

(Figures in parenthesis refer to folios in printed record.)

This action was instituted in the District Court of Dakota county, Minnesota, by the respondent, Edith F. Coogan, as special administratrix of the estate of William Coogan, deceased, to recover damages for the death of William Coogan, who received fatal injuries while employed by petitioner, as a brakeman at Farmington, Minnesota.

On July 14, 1923, about 7:00 A. M., petitioner's freight train No. 92, operating from Farmington to Austin, Minnesota, was being made up by a switching crew on track No. 1 of petitioner's yard at Farmington, Minnesota (ff. 67, 68 and 344). Coogan, the deceased, was rear brakeman of the road crew which was to have charge of the train after it had been made up and when it had started on its journey to Austin. Coogan was killed at about 7 A. M. and before the train had been turned over to the road crew. There was no eye witness to the accident and no one knew in what manner he met his death or what he was then doing. It is conceded by both parties that the train contained interstate cars and that the rights and liabilities of the parties are governed by the Federal Employers' Liability Act.

The tracks in the Farmington yard run east and west. The most northerly track is known as the main line track. South of and parallel to this track there are a large number of yard tracks numbered consecutively 1, 2, 3, etc. In making up train No 92 cars were picked up from the various tracks, pulled onto a so-called lead track at the west end of the yard and kicked down to the east on track No. 1. An iron pipe line three-fourths of an inch in diameter, called an air pipe line, extended parallel to and about one foot south of the south rail of track No. 1 (f. 422). It was fastened at various points to the top of ties by iron clamps or track spikes (ff. 355 and 356).

On the morning in question the first car kicked

east on track No. 1 was the caboose. The decedent rode the caboose on this movement. Thereafter, three cuts of cars were kicked onto track No. 1 from the west end and were coupled onto the caboose by impact (ff. 120 to 123, incl. and 176 to 180, incl.).

Dubke, a member of the switching crew, rode the head car of each one of these cuts and controlled their movements by the hand brakes (ff. 118 to 121, incl., 178 and 179). When the first cut of cars was coupled onto the caboose Dubke conversed with Coogan, who was then standing on the ground beside the caboose (f. 133). This was the last time anyone saw Coogan previous to the finding of his dead body (ff. 132 and 133). After the three cuts of cars had been kicked in on track No. 1, the engine shoved all of the cars one and one-half or two car lengths (ff. 181 and 182). It was the duty of head brakeman Delhanty, of the road crew, to couple up the air on the train (f. 128). After the road engine had been coupled onto the train, Dubke, for the purpose of accommodating Delhanty, started back along the south side of the train and coupled up the air at several different places (ff. 125, 129 and 130). While walking back along the train he discovered Coogan's body lying between tracks No. 1 and No. 2 (f. 130). The body was lying on its back (f. 92) with the head towards the west (f. 95) parallel to track No. 1 and wholly outside the south end of the ties (ff. 51 and 92). The body was located about a car length and a half west of the caboose (ff. 51 and 52). Certain marks on the

ground showed that the body had been dragged about ten feet (f. 54). These marks or scuffing on the ground were located outside of the south rail and extended from the rail out to where the body was found (f. 55). Blood was found on the southeast wheel of the car coupled to the caboose (ff. 56, 57 and 98). The air was not coupled between the caboose and this car. The decedent's hat and other articles were found between the rails under or near the draw bar between the second and third cars ahead of the caboose (ff. 104, 105 and 142). Apparently the wheels had run over decedent's left leg and left arm (ff. 144, 165 and 166). West of the body the air pipe line bulged up from the ties about three inches and bulged in toward the rail from three to six inches (ff. 217, 364, 366 and 474). The bulge in the pipe was about 12 or 15 feet long (ff. 218 and 273). The east end of the bulge was 15 feet west of the hat and other articles mentioned (f. 468) and was from 20 to 50 feet west of the body (ff. 214, 215, 243, 346, 362, 467 and 468).

A witness for the plaintiff testified that a man in coupling up air faces towards the engine. Defendant's witnesses showed that an experienced train man, in going in between cars to couple up the air, invariably has his left foot inside the rail (f. 482) and ordinarily has his right foot outside the rail (ff. 429, 480 and 490). He faces the angle cock (f. 437). Having in mind the train involved in this case a man stepping in between the cars from the left or south side would face towards the

caboose or rear end of the train (ff. 480 and 481). An experienced man would face towards the caboose or rear end of the train when coupling up the air from the left side. However, entering from the north or right side he would face towards the head end of the train. This is brought about by the fact that a man facing the end of any car finds the air hose is to the right of the draw bar and car coupler which in turn are located at the center of the end of the car (ff. 486 and 487).

The plaintiff introduced in evidence decedent's shoes and called attention to the fact that the outside of the counter of the left shoe was scratched and slightly dented in. The plaintiff did not show that this condition existed immediately after the accident or that it did not exist prior to the accident. The undertaker, who was one of plaintiff's witnesses and the only one who testified as to the condition of the shoe in this respect, stated that he noticed the dent and scratch in the shoe quite a while after the accident and that it was first called to his attention by plaintiff's counsel (ff. 146 and 147, 155 and 168). He had no personal recollection of the condition of the shoe when it was taken from decedent's body (f. 157). The shoe had been kept in the undertaker's garage (f. 149). There is no proof to show that the shoe was not scratched and dented during the time it was in the garage.

Mr. Coogan had worked for the defendant for fourteen years prior to the accident (f. 293). Practically every terminal yard on the line of railroad of the defendant, as well as on the line of rail-

way of other railway companies, contains an air pipe line similar to the one involved in the instant case and such air pipe line ordinarily is placed on top of the ties (ff. 417 to 421, incl.). The air pipe line in question was built three or four years prior to Coogan's death (ff. 326, 334 and 424).

He had been working on trains in and out of the Farmington yards since 1908, the year in which the yard was built (f. 335). The plaintiff testified that decedent, her husband, had been working on trains No. 91 and 92 in and out of Farmington practically all the time for a period of from three to four months prior to his death (ff. 303 and 335).

Train No. 91 was due to arrive at Farmington at 3:00 P. M. and train No. 92 was due to leave the same yard at 7:00 A. M. For several months, therefore, previous to July 14th, the date of the accident, when the train arrived at and left the Farmington yard, it would be daylight. Train No. 92 was ordinarily made up on track No. 1, on the main line track, track No. 2 or No. 3. From each of these tracks the air pipe line could be easily seen (ff. 344, 345, 405 and 406).

The air pipe line had been in substantially the same condition for five or six months before the accident (f. 352).

At the close of all the testimony in the case, defendant made a motion for a directed verdict in its favor on the ground that plaintiff had failed to prove any actionable negligence against the defendant, on the ground that any verdict in favor of the

plaintiff would, of necessity, be based wholly upon speculation and conjecture and on the further ground that the evidence conclusively showed that Mr. Coogan, the deceased, assumed the risk caused by the presence and condition of the air pipe line in question.

The motion was denied and the jury brought in a verdict for the plaintiff.

The defendant made a motion for judgment notwithstanding the verdict and this motion was denied.

Judgment was entered in the District Court of Dakota county in favor of the plaintiff on March 10, 1924.

The defendant appealed to the Supreme Court of Minnesota from such judgment and the judgment was affirmed by said Supreme Court on October 31, 1924.

Final judgment was entered in the Supreme Court of the state of Minnesota on November 13th, 1924, in the sum of fourteen thousand three hundred sixty-three and 29/100 ($14,363.29) dollars.

Under the undisputed evidence the judgment in this case has been awarded and affirmed against your petitioner under an erroneous interpretation of the Federal Employers' Liability Act as applied to the facts of this case, in the following particulars:

I.

Error in permitting a recovery herein upon rights asserted under the Federal Employers' Liability

Act, April 22nd, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291.

II.

Error in submitting to the jury the question whether or not under the Federal Employers' Liability Act the defective air pipe line proximately contributed to William Coogan's death for the reason that no evidence in the case will support such a finding or conclusion.

III.

Error in denying defendant's motion for a directed verdict and in permitting the jury, under the Federal Employers' Liability Act to return a verdict in favor of the plaintiff on account of the death of William Coogan for the reason that the cause of William Coogan's death was speculative and conjectural.

IV.

Error in denying defendant's motion for a directed verdict and in permitting the jury to pass upon the question as to whether or not decedent assumed the risk of the defective air pipe line for the reason that William Coogan, as a matter of law, assumed the risk of such defective condition under the Federal Employers' Liability Act.

V.

Error in denying defendant's motion for a directed verdict upon the ground that plaintiff failed

to prove a cause of action or right of recovery in her favor under the Federal Employers' Liability Act or under any other federal act.

VI.

Error in denying defendant's motion for a directed verdict in her favor for the reason that under the Federal Employers' Liability Act William Coogan assumed all risks to himself caused by the alleged improper construction and careless and negligent maintenance of the air pipe line.

VII.

Error in denying defendant's motion for a directed verdict made at the close of all the testimony on the ground that under all the evidence in the case William Coogan's death is speculative and conjectural.

VIII.

Error in denying defendant's motion for judgment notwithstanding the verdict upon the ground that plaintiff failed to prove that the alleged defective air pipe line proximately contributed to William Coogan's death.

IX.

Error in denying defendant's motion for judgment notwithstanding the verdict on the ground that under the Federal Employers' Liability Act, William Coogan assumed the risks to himself

caused by the alleged negligent construction and maintenance of the air pipe line.

THE QUESTIONS INVOLVED.

The plaintiff's theory of the case is that decedent stepped in between the caboose and the car attached to it from the south side of track No. 1, for the purpose of coupling up the air hose between those cars; that he faced towards the engine and had his right foot inside the south rail and his left foot outside the rail; that in making up the train the cars were backed to the east and decedent, in attempting to get out from between the cars caught his left foot under the air pipe line at the point where it was bulged and his foot became fastened; that as a consequence he was caught by the rigging on a moving car, thrown under the wheels and killed. The only claim of negligence is that the air pipe line was defective and that such defective condition was the proximate cause of decedent's death.

The first question, therefore, is whether or not the evidence under the Federal Employers' Liability Act is sufficient to sustain a finding that the alleged defective air pipe line proximately contributed to the death of Mr. Coogan.

The second question is, whether or not the decedent, under the Federal Employers' Liability Act assumed the risk of dangers incident to his working at or about the alleged defective air pipe line.

PRAYER.

In order to correct the error complained of and to the end that the right and liability of petitioner may be determined in accordance with the federal law, your petitioner prays that a writ of certiorari may be issued under the seal of this court, directed to the judges of the Supreme Court of the state of Minnesota and of the District Court of Dakota county, commanding them and each of them to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and of the proceedings of the said Supreme Court of the state of Minnesota in the within cause to the end that the judgment of said Supreme Court of the state of Minnesota in said cause may be reviewed by this court as provided by law and that your petitioner may have such other relief as to this court may seem appropriate.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO.,
Petitioner.

F. W. ROOT,
A. C. ERDALL,
Attorneys for Petitioner.

STATE OF MINNESOTA,

ss

County of Hennepin.

F. W. Root, being first duly sworn, says that he is one of the attorneys for the petitioner, Chicago, Milwaukee & St. Paul Railway Company; that he has read the foregoing petition; that he has also read the certified copy of the transcript of record under the seal of the Supreme Court of the state of Minnesota in the case of "Edith F. Coogan, as special administratrix of the estate of William Coogan, deceased, respondent, against the Chicago, Milwaukee & St. Paul Railway Company, appellant," and that he is familiar with the same; that he has also read a copy of the opinion of the said Supreme Court in said cause; that the matters of fact stated in said petition conform to said record and opinion and are true to the best of his knowledge, information and belief.

F. W. ROOT,

Subscribed and sworn to before me this 31st day of January, 1925.

A. E. SHARRETTS,

(Seal) Notary Public,

Hennepin County, Minnesota.

My commission expires July 14th, 1928.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Did the Plaintiff Prove That the Alleged Defective Air Pipe Line Proximately Contributed to Decedent's Death so as to Permit a Recovery Under the Federal Employers' Liability Act?

Plaintiff has evolved a theory as to how the accident occurred. Such theory is based upon a series of presumptions and not upon facts proven in this case.

The plaintiff has an accident causing death and a theory as to the way in which the accident occurred but such theory is unsupported by the testimony.

In *Perkins v. N. P. Ry. Co.*, 193 Fed. 219, at page 225 the court points out that this is not a sufficient basis on which to create a liability.

The leading case on this matter is *Patton v. Texas & Pacific Railway Company*, 179 U. S. 658, 45 L. Ed. 261, 21 Sup. Ct. Rep. 275. We, therefore, take the liberty of quoting rather extensively from that decision. On page 277 of the opinion the court said:

> "Upon these facts we make these observations: First, that while, in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against

him, for there is *prima facie* a breach of his contract to carry safely (*Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *New Jersey R. & Transp. Co. v. Pollars*, 22 Wall. 341, 22 L. Ed. 877; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 443, 35 L. Ed. 458, 463, 11 Sup. Ct. Rep. 859) a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second, that in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

See also:

Pittsburgh Coal Co v. Myers, 203 Fed. 221.

Smith v. Illinois Cent. R. Co., 200 Fed. 553.

Traux v. M. St. P. & S. S. M. Ry. Co., 89 Minn. 143.
Bruckman v. C. St. P. M. & O. Ry. Co., 110 Minn. 309.
Perkins v. G. N. Ry. Co., 152 Minn. 226.

In *United States v. Ross*, 92 U. S. 281, 23 Sup. Ct. Rep. 707, it is stated on page 108:

> "No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed."

The court on the same page states as follows:

> "A presumption which the jury is to make is not a circumstance in proof; it is not, therefore, a legitimate foundation for a presumption."

In the case of *Marian J. Looney, Admx., etc. v. Metropolitan Railroad Company*, 200 U. S. 480, 26 Sup. Ct. 303, the United States Supreme Court on page 306 lays down the following rule with reference to a presumption of negligence on the part of the employer in a case in which an employee is killed:

> "But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

See also

Freese v. C., B. & Q. Ry. Co., decided by the United States Supreme Court on October 15, 1923, and reported in 144 Sup. Ct. Rep. 1.

The plaintiff claims decedent stepped in between the caboose and the car attached to it, to couple up the air.

After the accident the air was not coupled between these cars and there was blood on the southeast wheel of the car ahead of the caboose.

Decedent may or may not have stepped in between the caboose and the car next to it. He may have started to get onto the west end of the caboose just at the time when cars were kicked into the caboose and on account of the impact been knocked off and fallen on the track between the caboose and the car next to it.

He may have started to go in between the cars and tripped on the rail, on the end of the tie or on the air pipe line at a point where it was not bulged. He may have been in between the cars and stumbled over the rail in getting out. He may have been between the cars and when he heard them backing up, have grabbed for a hand hold, missed it and fallen. He may have been on top of the cars to release the brakes and fallen between the caboose and the car next to it. No one saw the plaintiff step in between the cars and it is a presumption only that he did so.

It was the duty of the head brakeman of the road crew to couple up the air and not decedent's duty and therefore, it seems that a presumption that he stepped in between the cars to couple up the air would be unsupported by the evidence in this case.

It is plaintiff's theory that decedent had his right

foot inside the rail and his left foot outside the rail. Decedent's left leg and left arm were crushed and apparently run over. Under these circumstances the natural inference is that the left foot was inside the rail and the right foot outside. If the left foot was inside the rail it was not caught under the air pipe line outside the rail. Here again a presumption is indulged in without support in the evidence and in this instance the presumption is not consistent with the evidence in the case.

It is plaintiff's theory that decedent's left foot was caught and fastened under the air pipe line at the point where the pipe was bulged. In support of this theory she introduced in evidence decedent's left shoe which contained a slight indentation and scratch on the outside counter. No one noticed this condition of the shoe until a considerable time after the accident and the funeral. Before the dent and scratch was noticed on the shoe the decedent's shoes had been in the undertaker's garage for some time and no particular attention had been given to them. Here, of course, the plaintiff indulges in the presumption that the shoe had no dent or scratch on it before the accident and that the shoe was scratched and dented in the accident. There is no proof to show what the condition of the shoe was before the accident, what the condition of the shoe was immediately after the accident or what its condition was at the time it was taken off the body by the undertaker. If the left shoe had been fastened under the air pipe line the shoe would naturally be scratched on both the inside and out-

side of the foot. If the decedent's left leg was run over it is only natural to expect that the shoe would be dragged on the ground, or hit a rock, a tie, a bolt or a part of the car and as a consequence become dented and scratched. Surely a dent and scratch on one side of the shoe would not prove that the shoe was fastened under the air pipe line. There was absolutely no proof of any scuffing or other marks on the ties or the ground under the air pipe line or any evidence to indicate that anything had been caught under the air pipe line. The iron pipe was old and of course rusty, but no proof was introduced indicating that the rust was scraped off at any place. There was no proof of any marks on or under the pipe at any place. The proof was undisputed that the pipe had been in substantially the same condition for five or six months before the accident and plaintiff has not and cannot, claim that the pipe was bulged on account of the accident. The body was from 20 to 50 feet east of the east end of the bulge in the pipe. Decedent's hat and other articles were found 15 or more feet east of the east end of the bulge in the pipe. The scuffing and marks on the ground were found east of the hat and other articles mentioned. There is, therefore, no proof to indicate that decedent was in the immediate vicinity of the bulge in the air pipe line. There is no evidence in the case which supports a presumption that the decedent's left foot was fastened under the air pipe line at the point where the pipe was bulged.

As stated in the Patton case, *supra*, it is not suf-

ficient for the plaintiff to show that the defendant may have been guilty of negligence but the evidence must point to the fact that defendant was. As stated in the Looney case, *supra*, a right of recovery cannot be based upon a series of presumptions.

Without any support in the evidence the plaintiff indulges in the following presumptions:

1. That decedent stepped in between the caboose and car attached to it to couple up the air hose.

2. That decedent had his right foot between the rails and his left foot between the south rail and the air pipe line.

3. That the cars were moved before decedent had a chance to couple up the air hose.

4. That decedent endeavored to get out from between the cars.

5. That decedent at that time was at the place where the air pipe was bulged.

6. That decedent's left foot became fastened under the round air pipe line.

7. That the shoe was not dented or scratched before the accident.

8. That the left shoe was scratched and indented immediately after the accident.

9. That the left shoe did not become scratched or indented while on the floor of the undertaker's garage.

10. That the dent and scratch on the left shoe was caused by the foot being caught under the air pipe line.

11. That on account of decedent's left foot being caught under the air pipe line he was caught by the rigging of the car and was thrown under the wheels and killed.

The difficulty with plaintiff's theory in this case is that she has failed to prove facts from which the ultimate inferences which she wishes to establish can be drawn. She has merely suggested a series of presumptions many of which are not even consistent with facts proved in the case.

The weakness in plaintiff's case is that she has no facts to show that decedent stepped in between the cars. She has no evidence to show that he attempted to come out from between the cars. She has no evidence to show that his left foot ever became fastened under the air pipe line at the point where the air pipe line was bulged or at any other point and she has no evidence to show that at any time he was any nearer than 15 feet from the nearest end of the bulge in the pipe.

It is respectfully suggested that plaintiff has failed to prove that the alleged defective air pipe line proximately contributed to William Coogan's death.

DECEDENT ASSUMED THE RISK CAUSED BY THE CONDITION OF THE AIR PIPE LINE AND CANNOT RECOVER IN THIS CASE.

The evidence is undisputed that decedent worked on trains running into and from the Farmington yards for a period of three or four months next preceding the accident and during that time his train left and arrived during daylight and he had considerable occasion to be on and near track No. 1. He had a great many opportunities to observe the condition of the air pipe line. He had had considerable experience on trains running in and out of the Farmington yards prior to the period just above mentioned. The air pipe line had been in substantially the same condition for a period of at least five or six months before the accident and he is of course presumed to have known of its location and condition.

If he went in between the caboose and car next to the caboose as plaintiff claims he went in with a knowledge of the condition of the air pipe line in question, he, of course, fully appreciated the dangers and risk of his working between the cars in the vicinity of the air pipe line and he must have appreciated the dangers to be reasonably anticipated in working at and about such air pipe line at the point where it was bulged.

Special attention is called to the case of *Southern Pacific Co. v. Berkshire*, 254 U. S. 415, 41 Sup. Ct. Rep. 162. In the Berkshire case the United States Supreme Court holds that an engineer who has

passed over a particular route many times must be presumed to know of the existence of a mail crane when such mail crane was visible from the engineer's seat. This case we consider of special importance on this feature of the case and we therefore take the liberty of quoting rather extensively from it. On page 162, the court said:

> "The facts so far as made definite by the evidence are not in dispute. Linder was employed by the defendant as an engineer upon a train running from El Paso, Texas, to Deming, New Mexico. At Carney, in New Mexico, he was found sitting on his engineer's seat unconscious, with his right arm and pretty nearly half of his body outside of the cab, leaning with the right side and arm over the arm rest of the engine. There was a cut about an inch over the right ear. He had been struck by the end of a mail crane or a mail sack that had been placed on it to be picked up by a mail train following Linder's which was an extra carrying soldiers."

On page 163, the court stated as follows:

> "Linder has been upon this route for some years, has passed over it many times and must be presumed to have known of the crane. It was visible from the engineer's seat, half a mile ahead through a front window. About a mile before reaching Carney, Linder had noticed that the main driving pin on the engine was getting hot, had crept out upon the running board to see about it, and had returned. It may be supposed that at the time of the accident he was leaning out of the side window to look at it again and was acting in the course of his duty. The position in which his body was first seen and the place of the wound indi-

cate that he was more than fourteen inches out from the engine's side."

On page 163, the court further said:

"It is going very far to leave it open to a jury to attach liability *in tort* to a system by which the end of the arms of postal cranes come to fourteen inches from the car.

(3) But further, we must take it, as we have said, that Linder perfectly well knew of the existence of the crane where it stood, and could have seen it from his seat had he looked, long before he reached it. He entered the employment of the railroad when it had this appliance manifest in its place. The only element of danger that he may not have appreciated was the precise distance which the point of the crane would reach. But an experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from the train."

See also:

Tuttle, Admx. v. Detroit, G. H. & M. Ry. Co., 122 U. S. 189, 7 Sup. Ct. Rep. 1166, 30 L. Ed. 1114.

Little Rock & M. R. Co. v. Moseley, 56 Fed. 1009.

The air pipe line in question constituted a part of the equipment of the Farmington yard. If Linder in the Berkshire case was presumed to have known of the mail crane and to have known the danger to be expected therefrom, it seems clear that Coogan must be presumed to have known of the air pipe line and its condition and to have known the dangers to be expected therefrom by a

brakeman coupling up the air on track No. 1 from the south side of the train while cars were being kicked into and against said train. He, of course, knew that he might be required to get out from between the cars very rapidly and that any obstruction might be fatal. Of course, it should be kept in mind that it was the duty of the head brakeman to couple up the air and not the duty of decedent.

We submit that the reasoning of the United States Supreme Court in the Berkshire case is applicable and controlling in the present case on the question of assumption of risk and that it appears as a matter of law that Coogan assumed the risk of the method of construction and condition of the air pipe line in question and that such assumption of risk under the Federal Employers' Liability Act prevents a recovery on behalf of the plaintiff in this case.

It is, of course, regrettable that no one knows the manner in which Mr. Coogan met his death and it is indeed unfortunate that the plaintiff is not in a position to show the manner in which her husband met his death in order that the court may be in a position to decide whether or not the defendant company was or was not responsible for such death.

However, as indicated in the Patton and other cases mentioned above, juries should not be permitted to substitute sympathy for evidence in arriving at verdicts.

The manner in which Coogan met his death and the proximate cause thereof is purely speculative and conjectural and the plaintiff has failed to